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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL CAMERON JACKSON, Defendant and Appellant.	C060505 (Super. Ct. No. SF106682A)

A jury found defendant Gabriel Cameron Jackson guilty of infliction of corporal injury on the mother of his child (Pen. Code, § 273.5, subd. (a)), misdemeanor battery on the mother of his child (Pen. Code, § 243, subd. (e)), and contempt of court (Pen. Code, § 166, subd. (c)(1)), and found defendant was released on his own recognizance when he committed the infliction of corporal injury offense. In a bifurcated proceeding, the trial court found the alleged prior serious felony conviction true. The court denied defendant's motion to reduce the infliction of corporal injury charge to a misdemeanor and sentenced him to an aggregate term of four years in state prison.

On appeal, defendant contends he was denied a fair trial by the trial court's denial of his motion to sever claims, and that the trial court abused its discretion when it denied his motion to reduce the felony infliction of corporal injury on a spouse, cohabitant or parent of child to a misdemeanor. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The charges against defendant stemmed from two separate incidents, one on November 21, 2007, and the other on May 7, 2008.

November 21, 2007, Incident (*Counts One and Two*)

On November 21, 2007, Arika Stingley went to the home of her next door neighbors, Diane Eppert and Cheryl Kirchmeier. Stingley looked "disheveled" and "traumatized." She had a knot on her forehead, "her eyes were bruised" and she was in pain and having trouble getting around. Telling Eppert and Kirchmeier that her boyfriend (defendant) beat her up, she asked them if she could use their telephone. Eppert went down the street to a neighbor's house to call 911, while Kirchmeier stayed with Stingley, who called her mother, Maryann Watkins, on the phone. Stingley told Watkins, "Mama, mama, he done hit me in my eye, and I got this big old knot on my head."

Stockton Police Officers Kenneth Webb and Youn Seraypheap responded to the 911 call. When they arrived, Stingley was crying and "really upset." She had a knot on her forehead and a bruise on her right temple. She told them defendant hit and kicked her.

When paramedics arrived, Stingley was still "distraught" and crying. She again stated defendant hit her with a closed fist and kicked her several times. She complained of pain in her head, her right arm and her right leg. The paramedic did not notice any swelling at the time. Stingley was able to stand up from the couch on her own and get herself onto the gurney.

As paramedics tended to Stingley, Officers Webb and Seraypheap went to Stingley's house. Stingley's cousin, Regina Modicue,[1] was in the living room. Defendant was in the bedroom putting some clothes in a bag. When Seraypheap asked defendant to step outside, defendant yelled back several times that he "didn't do anything" and was "just gonna leave." Defendant eventually complied and was taken into custody and placed next to a patrol car.

Seraypheap returned to Eppert's house. Stingley told him she was afraid of defendant and was not going to come out until he was "gone from the scene." As emergency medical personnel prepared to move Stingley to the ambulance, several people heard defendant yelling something at Stingley like, "Arika, tell them I didn't hit you," or "Tell them I didn't do anything. I didn't hit you." At Seraypheap's direction, Webb placed defendant in the patrol car and drove him down the block so that Stingley could be removed from the scene without being intimidated. Stingley was taken to the hospital by ambulance.

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[1] Modicue told Webb she did not see anything during the incident.

When Webb returned to the scene, he interviewed Eppert and her roommate, and then he and Seraypheap went to the hospital to interview Stingley.[2]

During the interview at the hospital, Stingley stated that defendant hit her approximately 15 times, and that she tried to protect herself by holding her arms over her face. Stingley stated she had some pain where she had been hit on or near her right eye, and complained of pain in her right wrist. She had a knot on her forehead, a red mark near her right temple, a cut on her upper lip and several lumps on the back of her head. Webb felt some swelling when he touched Stingley's wrist. Seraypheap used his hand to feel the swelling on Stingley's forehead and the lumps on the back of her head.

At trial, Webb, Seraypheap, Eppert and Kirchmeier all testified that the photographs taken of Stingley on the day of the incident did not accurately reflect the severity of her injuries.

May 7, 2008, Incident (*Counts Three, Four and Five*)

On May 7, 2008, Stingley and defendant were living at the home of Stingley's sister, Monica Stingley (Monica)[3]. Defendant and Stingley began to argue about a cell phone.[4] Defendant told

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[2] The interview with Stingley was tape-recorded.

[3] We respectfully refer to Monica Stingley as Monica in an effort to avoid confusion between the victim and her sister.

[4] According to Monica, Stingley had the cell phone hidden under her leg but told defendant it was in the bedroom.

Stingley he would hit her if she did not get up and get the phone. When she did not comply, defendant grabbed her by the arms and pulled her up off the couch, and went into the kitchen where the argument continued. Monica went outside and called her mother, who instructed her to call the police. When Monica returned, Stingley was standing by the refrigerator holding her eye and crying. She confirmed that defendant hit her. Monica went back outside and called the police. When she returned to the kitchen a second time, defendant was holding Stingley's hair as Stingley was attempting to bite him. Soon thereafter, Stingley walked out of the house. Defendant packed his things and sped off in Stingley's car.

The next day, Monica observed that Stingley had a black eye. Stingley later told Monica she was "not going to tell what happened" when called to testify in the case.

Defendant was charged by amended information with infliction of corporal injury on the mother of his child (November 21, 2007, incident) (Pen. Code, § 273.5, subd. (a)--count one), dissuading a witness from reporting a crime (November 21, 2007, incident) (Pen. Code, § 136.1, subd. (b)(1)--count two), infliction of corporal injury on the mother of his child (May 7, 2008, incident) (Pen. Code, § 273.5, subd. (a)--count three), petty theft with a prior (May 7, 2008, incident) (Pen. Code, § 666--count four), and contempt of court (May 7, 2008, incident) (Pen. Code, § 166, subd. (c)(1)--count five). With respect to counts one through four, the information also alleged defendant had a prior serious felony conviction for

robbery on January 9, 2006 (Pen. Code, §§ 1170.12, subd. (b), 667, subd. (d)); with respect to count two, that defendant had a prior serious conviction based on the January 9, 2006, robbery (Pen. Code, § 667, subd. (a)); and with respect to count four, that defendant was released on his own recognizance on the November 21, 2007, charges (Pen. Code, § 12022.1).

At trial, Stingley recanted many of the statements and accusations she made against defendant to police and others at the time of the incidents, as well as statements she made during the preliminary hearing.

Defendant moved, pursuant to Penal Code section 954, to sever the charges related to the November 21, 2007, incident from those related to the May 7, 2008, incident on the grounds that the charging document was joining one weak case with another weak case, and the facts of both cases were likely to unduly inflame the jury against him, and because the two incidents were "not connected together in their commission." The People opposed the motion, arguing both incidents "are the same class of crimes" involving a violation of Penal Code section 273.5, and both incidents involve an assaultive crime against the same victim. The People also argued cross-admissibility of evidence pursuant to Evidence Code section 1109. The court denied the motion.

The jury found defendant guilty of counts one and five, guilty of the lesser included offense on count three, and not guilty on counts two and four, and found the bail enhancement allegation true.

The court, in a bifurcated proceeding, found the prior strike conviction true. Defendant requested that the court reduce count one to a misdemeanor pursuant to Penal Code section 17, subdivision (b) (section 17(b)). The court denied defendant's request and sentenced him to the low term of two years in state prison on count one, doubled pursuant to the prior strike conviction, plus concurrent six-month jail terms for the two misdemeanor convictions, for an aggregate sentence of four years in state prison, minus credit for time served.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Defendant contends the trial court erred in denying his motion to sever the November 2007 claims from the May 2008 claims because the evidence for both incidents was weak and the two incidents were not connected, and a more favorable result would have been probable had one weak case not bolstered the other.

Penal Code section 954 provides, in part: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated." "Because consolidation ordinarily promotes efficiency, the law prefers it." (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.)

"The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice

requiring that the charges be separately tried. [Citations.]" (*People v. Soper* (2009) 45 Cal.4th 759, 773 (*Soper*).)

Denial of a severance motion is reviewed for abuse of discretion. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315 (*Bradford*).) "When . . . the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant's severance motion. [Citations.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 160-161.)

Denial of a severance motion may be an abuse of discretion if "'a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges.'" (*Bradford*, *supra*, 15 Cal.4th at p. 1315.)

The trial court did not abuse its discretion here. First and foremost, the evidence as to each incident is admissible as to the other, landing this case squarely within the purview of Evidence Code section 1109.[5] The sole fact that evidence in one case is cross-admissible in the other is normally sufficient to dispel any suggestion of prejudice and to justify a trial

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[5] Evidence Code section 1109, subdivision (a)(1), provides as follows: "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

court's refusal to sever properly joined charges. (*Soper, supra,* 45 Cal.4th at pp. 774-775.)

Nonetheless, defendant argues the charges were not properly joined because the evidence related to both incidents was weak. We disagree. While Stingley may have recanted, as victims of domestic violence so often do, her original statements were admissible as prior inconsistent statements. Moreover, there was plenty of evidence from other witnesses that corroborated her initial version of events as stated at the time the two incidents occurred.

Stingley's neighbors, Eppert and Kirchmeier, gave accounts of the November 21, 2007, incident consistent with Stingley's claim of domestic violence perpetrated by defendant, describing Stingley's statements, her injuries and her physical and emotional state. They also heard defendant yelling at Stingley to tell police he did not hit her.

Police Officers Seraypheap and Webb also attested to Stingley's injuries and demeanor and her statements immediately following the incident, as did the paramedics responding to the scene, all of which testimony was consistent with defendant having beaten Stingley. Even Stingley's mother, Maryann Watkins, testified that Stingley called her and told her defendant had just beaten her. The fact that there were no "percipient witnesses" as defendant argues is of little consequence given the evidence provided by these witnesses.

There was reliable evidence regarding the May 7, 2008, incident as well. Stingley's sister, Monica, testified that she

personally heard defendant threaten to hit Stingley and saw him pull her up off the couch by her arms. Moments after Monica left defendant and Stingley in the kitchen, she returned to find Stingley holding her eye, saying she had just been hit by defendant. She observed Stingley with a black eye the following day. Finally, Monica heard Stingley say sometime later that she did not intend to testify truthfully at trial regarding the events that had occurred on the day of the incident.

Given the testimony of each of these witnesses, the jury was well equipped to judge which of Stingley's stories was more credible, and thus to determine whether to convict defendant of the charges against him.

Defendant urges that the two incidents were not "connected together in their commission" for purposes of Penal Code section 954. In doing so, however, he ignores the remainder of the statute, which permits joinder of "two or more different offenses of the same class of crimes or offenses," exactly the scenario facing us here. Each incident here involved an act of domestic violence by the defendant against the same victim.

Despite Stingley's recantations, there is strong evidence that defendant beat her in both incidents and, given that both incidents are of the same class, joinder of those claims was proper under Penal Code section 954. The trial court did not err in denying defendant's motion to sever claims.

II

Defendant contends that, because the victim's injuries were "minor," the trial court's refusal to reduce count one to a

misdemeanor pursuant to section 17(b) was an abuse of discretion.

A so-called "wobbler" offense is treated as a misdemeanor upon the occurrence of one of certain statutorily specified events: (1) upon a judgment imposing punishment other than imprisonment in the state prison; (2) when the defendant is committed to the Youth Authority and the court designates the offense to be a misdemeanor; (3) when the court grants probation without the imposition of sentence and then, or on subsequent application of the defendant or the probation officer, declares the offense to be a misdemeanor; (4) when the prosecutor specifies the offense to be a misdemeanor and files a complaint in a court having jurisdiction over misdemeanors; or (5) when, at or before the preliminary hearing and before filing an order holding the defendant to answer, the magistrate determines that the offense is a misdemeanor. (§ 17(b).)

Section 17(b) allows a trial court to choose between alternative felony or misdemeanor punishment based on the language of the charging statute. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974 (*Alvarez*).) In determining whether to exercise section 17(b) discretion, the trial court should consider the nature of the offense, defendant's appreciation of and attitude toward the offense, his behavior at trial, and the general objectives of sentencing. (*Alvarez*, at pp. 977-978.)

"On appeal, . . . 'The burden is on the party attacking the sentence to clearly show that the sentencing decision was

irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*Alvarez, supra,* 14 Cal.4th at pp. 977-978.)

Defendant argues the count should have been reduced because Stingley's injuries were minor and she herself admitted she had exaggerated the extent of her injuries. He has not met his burden. First, it is clear from the verdicts that the jury did not believe the version of events as testified to by Stingley at trial.

Second, the trial court acknowledged that the injuries to Stingley were "not great at all." However, the court stated that the minimal injuries were not for defendant's lack of trying and noted further that, despite the fact that defendant had been placed on probation just prior to the first incident and instructed by the court to stay out of trouble, he nonetheless began a pattern of violence against Stingley. Based on those factors, the court denied defendant's motion. That decision was neither arbitrary nor irrational, particularly in light of testimony from Eppert, Kirchmeier, Watkins, police officers and medical personnel regarding three additional uncharged but relatively recent[6] instances of domestic violence

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[6] The testimony related to incidents that occurred on January 6, 2007 and January 7, 2007 (defendant hit Stingley several times

perpetrated by defendant against Stingley, each committed while Stingley was pregnant.

The trial court did not abuse its discretion in denying defendant's section 17(b) motion.

III

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credits. We conclude that the amendments do apply to all appeals pending as of January 25, 2010. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendment to statute lessening punishment for crime applies "to acts committed before its passage provided the judgment convicting the defendant is not final"]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of *Estrada* to amendment allowing award of custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [applying *Estrada* to amendment involving conduct credits].) However, the recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he had a prior serious felony conviction for robbery. (Pen. Code, §§ 1192.7, subd. (c)(19); 4019, subds. (b) and (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

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with a closed fist in the stomach), and March 23, 2007 (defendant hit Stingley numerous times in the head).

DISPOSITION

The judgment is affirmed.

SIMS, J.

We concur:

SCOTLAND, P. J.

ROBIE, J.